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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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No. 807

SUN PUBLISHING COMPANY,

*Petitioner,*

*v.*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE  
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF  
LABOR,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.**

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*To the Honorable the Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:*

The Sun Publishing Company respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a decree of said court entered on January 24, 1944 (R. 651), modifying and enforcing as modified an order of the District Court of the United States for the Western District of Tennessee, entered October 30, 1942, in a proceeding brought by the Administrator of the Wage and Hour Division, United

States Department of Labor, to enjoin petitioner from violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201 et seq.) (R. 632-634).

The opinion of the District Court is reported in 47 F. Supp. 180-192. The opinion of the Circuit Court of Appeals (R. 652-659) is as yet unreported.

#### A.

#### **Statement of the Matter Involved.**

On March 15, 1941, respondent herein, who is the Administrator of the Wage and Hour Division, United States Department of Labor, brought a proceeding in the District Court of the United States for the Western District of Tennessee to enjoin petitioner from violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201 et seq.).

Petitioner, the Sun Publishing Company, is a corporation organized and existing by virtue of the laws in the State of Tennessee, maintaining its principal place of business in the city of Jackson, County of Madison, where it is engaged in the printing and publishing of a newspaper and the operation of a radio broadcasting station. The radio operations of petitioner are not involved in this proceeding.

Petitioner's newspaper, The Jackson Sun, is published weekday evenings, Monday through Friday, and on Sunday mornings. The Jackson Sun in 1941 had a daily circulation of approximately 9,000 and a Sunday circulation of approximately 11,000, of which approximately all but 200 copies, daily and Sunday, were distributed in the State of Tennessee (R. 621). Petitioner obtained from outside

of Tennessee news reports, feature matter, advertising copy, newsprint and ink, all of which went into the production of its papers in its plant in Jackson.

Fourteen weekly newspapers exempt from the Act in controversy are published in the vicinity of Jackson (R. 621-622) and are directly competitive with petitioner's newspaper (R. 38).

Prior to the filing of the bill of complaint agents of the respondent had made inspections of petitioner's records in December 1939 and again in December 1940. Following the first inspection demand was made upon petitioner that it pay back overtime wages to some 21 employees whom the inspector alleged to have worked in excess of the maximum hours provided for in Section 7 of the Act without being compensated in accordance with the provisions of that section for their overtime. Petitioner requested the detail of the demand from respondent's agent but this was refused. The record is devoid of any evidence that any employee at any time, either prior to or after the filing of the bill of complaint, made any claim upon petitioner for back overtime under the statute.

Following the December 1939 inspection, all employees of petitioner except the heads of departments who were classified as executives were notified that they were on a 40-hour week basis; that no overtime would be permitted unless ordered by their executives; and that no salaries would be paid until and unless the employees entitled to them turned in time slips for the salary weeks indicating the number of hours, day by day, worked therein. The record is undisputed that while the employees turned in such time slips they made no effort to keep any accurate account of their hours of work.

In his bill of complaint the Administrator alleged that petitioner had failed to pay certain of its employees the minimum wages prescribed in Section 6 of the Act; that

petitioner had failed to pay certain other of its employees overtime in accordance with the requirements of Section 7 of the Act; that petitioner had failed to keep its records in accordance with Section 11 (c) of the Act and that petitioner had knowingly falsified its records to indicate compliance with the provisions of Sections 6 and 7 of the Act.

In the District Court petitioner moved to dismiss the action on the ground, *inter alia*, that the court lacked jurisdiction since the Act as applied to petitioner's newspaper publishing business was unconstitutional and void. This motion was overruled but without prejudice to renew at the trial. The motion was renewed during trial and again overruled.

In its answer petitioner, in addition to denying the jurisdiction of the court, affirmatively defended on the ground that the attempted application of the Act to its business as a publisher of a daily newspaper violated its rights as guaranteed by the First Amendment to the Constitution of the United States and constituted an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the Fifth Amendment to the Constitution (R. 60-62). Petitioner also denied that it was engaged in commerce or in producing goods for commerce within the Act; asserted a defense under Section 13 (a) (2) thereof; and attacked the regulations promulgated by respondent under Section 13 (a) (1) of the Act as arbitrary and capricious in their application to its employees.

The case came on to be heard before Judge Marion S. Boyd in the District Court at Jackson on September 15, 1942. Respondent presented fifteen witnesses during the trial and petitioner presented five. A stipulation between the parties as to the nature of petitioner's newspaper publishing business was entered into, received by the court and made a part of the record (R. 449-459).

On October 30, 1942, the District Court entered its order enjoining petitioner from violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Act (R. 632-634). The District Court specifically found that there had been no falsification of records. By the terms of its order, however, petitioner was enjoined from sending its newspapers to subscribers residing outside of the State of Tennessee.

Petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit. Argument on its appeal was heard on November 30, 1943, in Cincinnati, Ohio.

On January 24, 1944, the Circuit Court of Appeals amended Paragraph 3 of the District Court's order which provides:

“The defendant shall not, contrary to section 15 (a) (1) of the Act, ship, deliver, transport, offer for transportation, or sell in interstate commerce, as defined by the Act, or ship, deliver, or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in paragraphs (1) and (2) of this judgment” (R. 633-634).

by adding the following:

“Provided that nothing herein shall prevent or prohibit the defendant from shipping, delivering, transporting, or offering for transportation or sale its newspapers in interstate commerce or otherwise” (R. 651).

In all other respects, it affirmed the order of the District Court.

B.

### **Jurisdiction.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347 (a)). The decree of the United States Circuit Court of Appeals to be reviewed was entered on January 24, 1944 (R. 651).

C.

**Constitutional, Statutory and Regulatory Provisions Involved.**

The constitutional provisions involved are Article I, Section 8, Clause 3, of the Constitution of the United States and the First and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix, page 33.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 et seq.). The statute is set forth in the Appendix, pages 35-47.

The regulatory provisions involved are the regulations of the Administrator of the Wage and Hour Act, promulgated under the authority granted in Section 13 (a) (1) of the Act. These regulations are set forth in the Appendix, pages 49-55.

D.

**Questions Presented.**

1. Whether Congress, in the light of the prohibition in the First Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of petitioner.

2. Whether, in view of the provisions of the First and Fifth Amendments, Congress has the power to regulate the business of the press by classifying the press on the basis of volume of circulation, frequency of issue and area of dis-

tribution in such a manner as to exempt more than 72 per cent of the total number of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

3. Whether Congress has the power under the commerce clause of the Constitution to apply the Act to petitioner's newspaper publishing business.

4. Whether Sections 6 and 7 of the Act can be applied to petitioner's newspaper publishing business in view of the provisions of Section 13 (a) (2) which exempts employees of a service establishment the greater part of whose servicing is in intrastate commerce.

5. Whether the definitions of "employees employed in a bona fide executive \* \* \* professional \* \* \* capacity" as promulgated by the Administrator and applied to the newspaper publishing business are void because arbitrary, capricious and unreasonable in nature.

6. Whether, where the record demonstrates that employees deliberately violated specific instructions to perform their work within the statutory period and turned in false and inaccurate time slips to show compliance with said instructions, the Administrator can obtain an injunction to restrain the employer from violating the record-keeping provisions of the Act based on findings of the lower court giving credence to the employee's testimony as to overtime, thereby shifting the responsibility for their overtime to their employer.

E.

### **Reasons Relied On for the Allowance of the Writ.**

1. *The decree constitutes a particular form of abridgment of the constitutional guaranty of a free press not heretofore reviewed by this Court.*

There is here presented to this Court for the first time the question as to whether, in a regulatory law applying to only certain businesses and industries in the United States and in turn only to certain types of employees within those businesses and industries of the United States, Congress, notwithstanding the prohibition of the First Amendment, has power under Article I, Section 8, Clause 3 of the Constitution to regulate the business of the press on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to impose its regulatory burdens upon less than 28 per cent of all the newspapers in the United States of which petitioner's newspaper is one while exempting all others from those burdens. The decision of the Circuit Court of Appeals disregards the limitation upon the exercise of the commerce power contained in the First Amendment. Also it is in conflict with numerous decisions of this Court holding that the press cannot be burdened in such a manner as here attempted.

*2. The holding that application of Sections 6 and 7 of the Act to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict with the principles announced by this Court in Grosjean v. American Press Co., 297 U. S. 233 (1936).*

The decision of the Circuit Court of Appeals, upholding as it does the classification of the press on the basis of volume of circulation, frequency of issue and area of distribution, violates the rights of petitioner as guaranteed by the First and Fifth Amendments to the Constitution of the United States. It is in conflict with the decision of this Court in *Grosjean v. American Press Co.*, *supra*, which unanimously held that a legislature cannot classify the

press on the basis of volume of circulation for purposes of taxation.

3. *The holding that the Fair Labor Standards Act is applicable to petitioner's business is in conflict with decisions of this Court under the Act and with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in Schroeffer v. A. S. Abell Co., 138 F. (2d) 111, (Certiorari denied January 17, 1944).*

The decision of the Circuit Court of Appeals is in conflict with the holdings of this Court that the business of printing, preparing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. It is also in conflict with decisions of this Court in controversies involving the application of the Act herein. Likewise it is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the recent *Schroeffer* case, where certiorari was denied by this Court.

4. *The question whether petitioner's business is exempt from the application of the Act under Section 13 (a) (2) is an important one in the administration of the Act and should be decided by this Court.*

The decision of the Circuit Court of Appeals is in conflict with decisions of this Court holding that the business of gathering and disseminating information is essentially one of service to the public. It is also in conflict with the most recent pronouncement of this Court to the effect that freedom of the press is in a preferred position as against all other types of business by reason of the guaranty in the First Amendment.

5. *The definitions of "employees employed in a bona fide executive \* \* \* professional \* \* \* capac-*

*ity'' as promulgated by the Administrator and applied to the newspaper publishing business are arbitrary, capricious and unreasonable and should be reviewed by this Court.*

The decision of the Circuit Court of Appeals upholding the regulations promulgated by the Administrator defining "employees employed in a bona fide executive \* \* \* professional \* \* \* capacity" is not based upon the record in this case, upon custom or practice in the newspaper publishing business in respect of executive employees, or upon the historical concept of professional employment.

*6. The holding by the Circuit Court of Appeals that petitioner is responsible for the failure of its employees to carry out its instructions in respect of hours to be worked and reports to be made thereon is in conflict with the decisions of numerous other courts, has not heretofore been presented to this Court, and should be determined by this Court.*

The Circuit Court of Appeals held that, notwithstanding petitioner had instructed its employees not to work overtime except when ordered to do so by their executive superiors and further had required each employee to fill out a signed time slip indicating his hours of labor, day by day, for each payroll week, petitioner was responsible for the failure of its employees to carry out its instructions and was liable for overtime pay for hours claimed to have been worked in violation of instructions and not reported on the time slips. This holding is in conflict with numerous decisions of other courts but the question itself has never been presented to this Court for final determination.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals

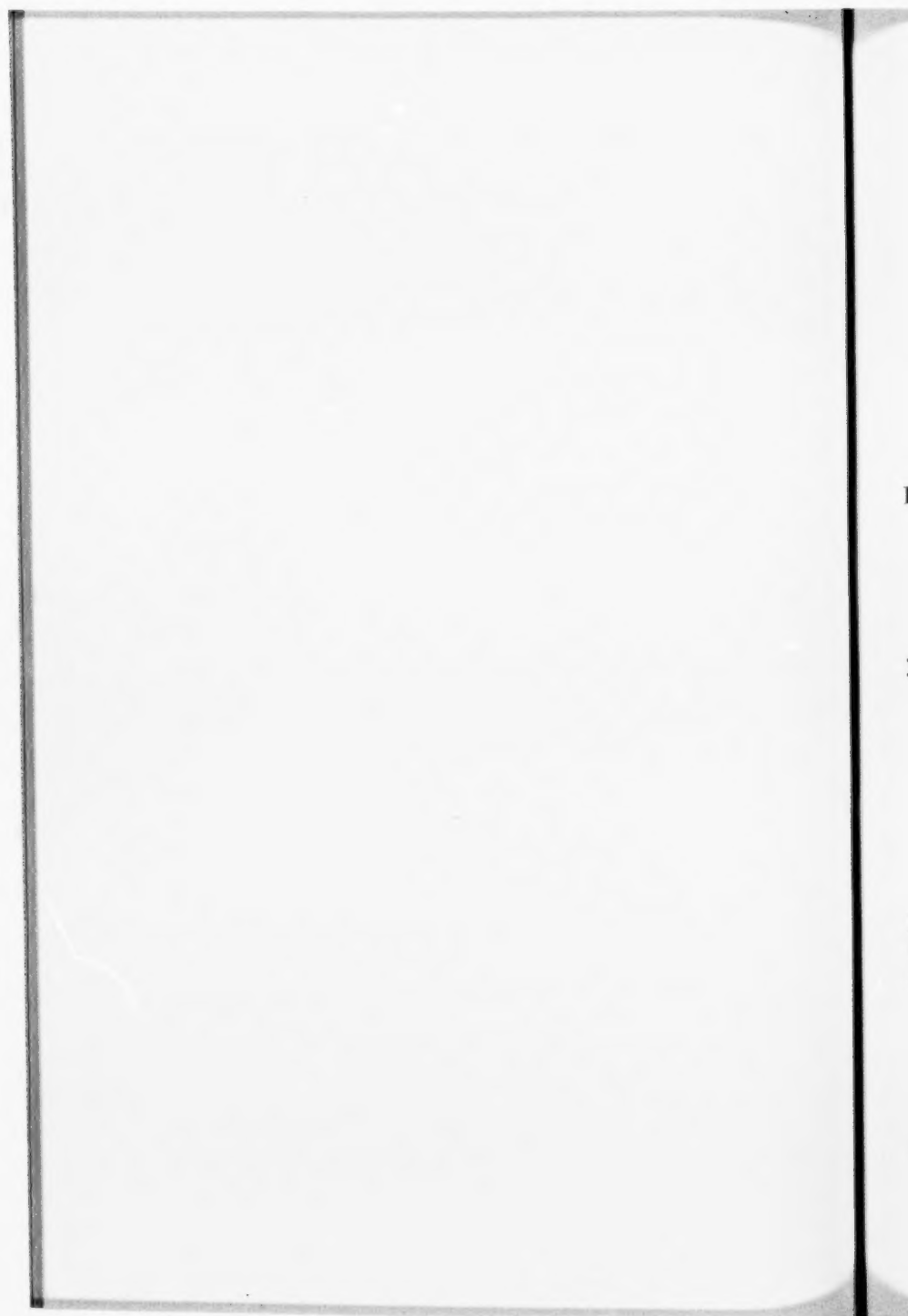
enforcing with modifications the decree of the District Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.**

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I.

**Preliminary Statement.**

The opinions below, the statement of the matter involved, jurisdiction and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

**Summary of Argument.**

*Point 1.* The decree constitutes a particular form of abridgment of the constitutional guaranty of a free press

not heretofore reviewed by this Court. The Act in controversy is not a general law affecting all persons alike. Section 13 exempts many types of employees from the so-called benefits of the Act. Furthermore it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry in the United States was classified in this Act for purpose of regulation. That business was the newspaper publishing business. The question presented is unique in that for the first time there has been presented to this Court the question of the power of Congress to classify the press for purposes of regulation through the device of using the factors of volume of circulation, frequency of issue and area of distribution to accomplish the results desired. If the power of Congress so to classify the press be approved by this Court, then there is no limit to the extent to which Congress may burden any particular portion of the press or any particular member thereof it so desires. The guaranty contained in the First Amendment is not limited to the prohibition of restrictions upon the content of publications but extends to all such measures as tend to restrict content, circulation or the ability of a newspaper to serve its readers.

*Point 2.* The holding that application of Sections 6 and 7 of the Act to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict with the principles announced by this Court in *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). The exemption of employees of a particular group of newspapers, as provided for in Section 13 (a) (8) of the Act constitutes an arbitrary and injurious discrimination in that it results in a classification in violation of petitioner's rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States.

*Point 3.* The holding that the Fair Labor Standards Act is applicable to petitioner's business is in conflict with decisions of this Court under the Act and with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Schroepfer v. A. S. Abell Co.*, 138 F. (2d) 111 (Certiorari denied January 17, 1944). The Fair Labor Standards Act applies only to employees engaged in commerce or in producing goods for commerce. This Court has held that it cannot conclude that all phases of an intrastate business are covered by the Act solely because that business makes its purchases interstate. This Court has also held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. Petitioner's newspaper herein sends less than two per cent of its Sunday circulation outside of the state of circulation and less than three per cent of its daily publication outside of the state. Its business falls squarely within the *de minimis* doctrine.

*Point 4.* The Circuit Court of Appeals' decision instead of maintaining the preferred position accorded to the press by reason of the provisions of the First Amendment as construed by this Court deprives the press of that position and places it in one inferior to such establishments as dry cleaning establishments, laundries, barber shops, beauty and massage parlors, shoe shining stands and the like. It raises the question as to whether the press whose sole business is the gathering and dissemination of information in the printed form is engaged in service or merely in producing goods for sale.

*Point 5.* The definitions of employees "employed in a bona fide executive \* \* \* professional \* \* \* capacity" as promulgated by the Administrator, applied to the newspaper publishing business by him, and upheld by

the Circuit Court of Appeals are arbitrary and capricious. The record herein demonstrates that the Administrator instead of following the custom and the practice of the newspaper publishing business in respect of its departmental executives in his definition of an employee employed in a bona fide executive capacity so defined it as to purposely remove from the executive classification foremen in the mechanical departments of more than 1,000 newspapers in the United States in disregard of custom, practice, union contracts and powers exercised by the executives themselves. The record also shows in respect of the Administrator's definition of employees employed in a bona fide professional capacity, as applied to the newspaper publishing business by him and upheld by the Circuit Court of Appeals, that that definition was purposely drafted so as to extend the so-called "benefits" of the Act to as many employees employed in a professional capacity as possible by fixing a minimum salary for their employment. The Administrator in his definition specifically exempted lawyers and doctors licensed to practice their profession from this salary limitation. The Circuit Court of Appeals in its opinion held that, notwithstanding the historic treatment of those who gather, write and edit the news as persons employed in a profession, they were not professional in any sense of the word, *inter alia*, because none of them had taken examinations for competency or secured licenses from any authority in order to practice their professions. The holding of the Circuit Court of Appeals in this respect is repugnant to the guaranty of the First Amendment which forever prohibited the licensing of the press or any person engaged in the performance of any of its functions as a condition precedent to engaging therein.

*Point 6.* The holding by the Circuit Court of Appeals that petitioner is responsible for the overtime hours claimed to

have been worked by its employees in violation of its instructions is in conflict with the overwhelming weight of authority as evidenced by the decisions of other courts and should be determined by this Court. Irrespective of the application of the Act to petitioner's business, the record herein shows that petitioner ordered all of its employees, except executives, not to work any overtime unless specifically instructed to do so. The record also shows that the employees were ordered to turn in their time slips for each payroll week accurately setting forth the hours worked, day by day, before they could receive their pay. The record further shows that no employee ever made any claim upon this petitioner for overtime and the testimony given by certain of its employees and former employees shows that they disregarded petitioner's instructions both as to overtime work and the accurate reporting of hours worked. The Circuit Court of Appeals held petitioner liable for violations of Section 7 of the Act because its employees refused to carry out its instructions. This finding should be reviewed by this Court.

### III.

#### **Argument.**

##### POINT 1.

*The decree constitutes a particular form of abridgment of the constitutional guaranty of a free press not heretofore reviewed by this Court.*

The controlling issue in this case is whether Congress in the exercise of its regulatory powers derived from Article I, Section 8, Clause 3 of the Constitution can nullify the prohibition against restraints of the press embraced in the First Amendment to the Constitution.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types

of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry was classified in this Act for purposes of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13 (a) (8) all weekly and semi-weekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

The record shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000 (R. 451).

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies (R. 451).

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent

of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (R. 451-452; Exhibit A to Stipulation—Small Daily Newspapers under Fair Labor Standards Act.)

Competing with petitioner's newspaper, The Jackson Sun, with a daily circulation of approximately 9,000 and a Sunday circulation of approximately 11,000, are fourteen weekly newspapers published in the vicinity of Jackson all of which are exempt from the burdens of the Act by reason of the provisions of Section 13 (a) (8) (R. 450-451).

Analysis of the provisions of Section 13 (a) (8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution. This Court has held that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

This Act lays a direct burden on the press. The business of preparing and printing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation. If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict their circulation. Petitioner could remove itself wholly from the possible application of this law by eliminating its 200 out of state subscribers and could, irrespective of the law here challenged, operate more profitably by confining its circulation to the State of Tennessee (R. 571). Thus, the effect of the application of this Act to the newspaper publishing business is to restrict circulation. This Court has held that restriction of circulation violates the guaranty of the First

Amendment. *Lovell v. Griffin*, 303 U. S. 444 (1938); *Schneider v. State*, 303 U. S. 147 (1939); and *Near v. Minnesota*, 283 U. S. 697 (1931).

This Act regulates the press by classifying it. It must be conceded that once the power to regulate is admitted that power is absolute. *A. Magnano Co. v. Hamilton*, 292 U. S. 40 (1934). So, if Congress has the power to classify the press as it has done here, it can exercise that power so as to benefit or burden any particular portion of the press it so desires.

The decision of the Circuit Court of Appeals in effect holds that the press is so vested with a public interest that it can be regulated, restricted, restrained and controlled just like a stock exchange, a commodity exchange, a stockyard, a railroad, an electric utility, all of which can be required to take out a license, obtain certificates of convenience or procure charters with special limitations before they can operate. Therefore, this Court should review the Circuit Court of Appeals' decision to determine whether the public good requires that the press shall be subject to such a control in the light of the provisions of the First Amendment to the Constitution of the United States.

The issue in the broad aspects presented by this controversy has not heretofore been reviewed by this Court. *Associated Press v. NLRB*, 301 U. S. 103 (1937), involved the sole issue whether an order of reinstatement of an employee discharged for engaging in union activities infringed the constitutional guaranty and is not decisive of the issue here.

## POINT 2.

*The holding that application of Sections 6 and 7 of the Act to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict with the principles announced by this Court in Grosjean v. American Press Co., supra.*

As has been pointed out hereinbefore Section 13 (a) (8) of the Act classifies the press on the basis of volume of circulation, frequency of issue and area of distribution in such a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are fourteen weekly newspapers published in the vicinity of Jackson, Tennessee, where petitioner's daily and Sunday paper is published. The total circulation of these papers, all of which are competitive with petitioner, is 100 per cent greater than petitioner's daily and 75 per cent greater than petitioner's Sunday circulation (R. 37-38, 451). The record shows that petitioner's newspaper is engaged in identically the same business as the exempt newspapers.

Therefore, the exemption of employees of a particular group of newspapers, as provided for in Section 13 (a) (8) of the Act, constitutes an arbitrary and injurious discrimination in that it is a classification in violation of petitioner's rights as guaranteed by the Fifth Amendment to the Constitution.

It follows that the lower court's holding that the application of Sections 6 and 7 to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict

with the principles announced by this Court in *Grosjean v. American Press Co.*, *supra*, and should be reviewed by this Court.

### POINT 3.

*The holding that the Fair Labor Standards Act is applicable to petitioner's business is in conflict with decisions of this Court under the Act and with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in Schroeffer v. A. S. Abell Co.*, 138 F. (2d) 111 (Certiorari denied January 17, 1944).

The Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942); *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943).

This Court last term in *Walling v. Jacksonville Paper Co.*, *supra*, at page 571, stated that “\* \* \* we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate.” And, in the companion case, *Higgins v. Carr Brothers Co.*, 317 U. S. 572 (1943), this Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state to customers within the state.

The United States Circuit Court of Appeals for the Fourth Circuit followed these decisions in *Schroeffer v. A. S. Abell Co.*, *supra*, when it stated:

“\* \* \* there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers,

as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients.' (138 F. (2d) at page 114.)

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock v. Curtis Publishing Co.*, 252 U. S. 436 (1920). Thus, petitioner's newspaper publishing business falls within the category of local business which Congress left to the protection of the states. *Walling v. Jacksonville Paper Co.*, *supra*.

The record herein shows that less than three per cent of petitioner's total circulation is mailed to subscribers outside of the state.

Since this interstate business is so small a percentage of petitioner's business and since it is not an essential part of the service petitioner renders its customers, it comes within the *de minimis* doctrine.

This Court in *NLRB v. Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the doctrine of *de minimis*. Since, as this Court has pointed out in *A. B. Kirschbaum Co. v. Walling*, *supra*, this Act is more narrowly confined than the National Labor Relations Act, it is clear that the doctrine of *de minimis* should be applied here.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small por-

tion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg v. Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Zehring v. Brown Materials*, 48 F. Supp. 740 (S. D. Calif., January 19, 1943); *Sapp et al. v. Horton's Laundry*, 7 Wage and Hour Reporter 144 (N. D. Georgia, January 18, 1944).

In *Mabee et al. v. White Plains Publishing Co.*, 7 Wage and Hour Reporter 64 (N. Y. Supreme Court, Appellate Division, December 29, 1943), it was held that the mailing of less than one-half of one per cent of its total circulation to subscribers temporarily out of the state did not bring a newspaper within the coverage of the Act. As pointed out by the Appellate Division in the *Mabee* case, the small out of state circulation was only an incidental part of its essentially local business.<sup>1</sup>

*Associated Press v. NLRB*, *supra*, is not in conflict with the foregoing principles. The Associated Press is not a newspaper. It is an organization directly engaged in interstate communication in gathering and disseminating information to newspapers and others.

Since the holding of the court below that the Act is applicable to petitioner's business because its employees are engaged in commerce or the production of goods for commerce is in conflict with decisions of this Court under the Act and with that of the Fourth Circuit Court of Appeals in *Schroepfer v. A. S. Abell Co.*, *supra*, this Court should review that holding.

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<sup>1</sup> In this case the judgment of the trial court when reduced to dollars and cents cost imposed a burden of \$1.12½ on each copy of the defendant's newspapers sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy.

## POINT 4.

*The question whether petitioner's business is exempt from the application of the Act under Section 13 (a) (2) is an important one in the administration of the Act and should be decided by this Court.*

Section 13 (a) (2) of the Act provides that:

“The provisions of Sections 6 and 7 shall not apply with respect to \* \* \* any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.”

There is no dispute in the record that petitioner in its newspaper publishing business is engaged in the sole business of gathering information and disseminating it in the printed form.

The question is whether or not petitioner's newspaper, The Jackson Sun, constitutes a necessary part of the service as the vehicle of dissemination or constitutes “goods” produced for commerce because of the infinitesimal portion of petitioner's newspaper circulation distributed across state lines.

From the day the first newspaper was published in the United States until the present time the business of the press has been one of service to the public in the nature of disseminating vital information in the printed form. That information consists of news, editorial comment and advertising (R. 30).

This Court has reiterated time and time again the importance of this service to the public and in its most recent pronouncement on this subject in *Murdock v. Pennsylvania*, *supra*, this Court stated that freedom of the press is in a preferred position as against all other types of business.

Yet the Administrator has held in respect of the exemption of Section 13 (a) (2) that dry cleaning establishments,

laundries, barber shops, beauty and massage parlors, shoe shining stands, and the like are in a preferred position as against the press (1942 Wage and Hour Manual, Part 1, Ch. 7, page 332-333), and the order of the lower court affirms this holding.

The statutory exemption here under consideration does not provide for a definition by the Administrator. Therefore, it is incumbent upon the courts to issue authoritative rulings to guide him.

This Court's decision in *A. B. Kirschbaum Co. v. Walling*, *supra*, is not helpful in determining whether petitioner's employees are exempt under Section 13 (a) (2).

The question of whether petitioner's employees are exempt under Section 13 (a) (2) is important not only to petitioner but to all other newspaper publishers the greater part of whose service to readers is rendered intrastate. The settlement of this question is important in the administration of the Act and this Court should decide it.

#### POINT 5.

*The definitions of "employees employed in a bona fide executive \* \* \* professional \* \* \* capacity" as promulgated by the Administrator and applied to the newspaper publishing business are arbitrary, capricious and unreasonable and should be reviewed by this Court.*

Section 13 (a) (1) provides that:

"The provisions of Sections 6 and 7 shall not apply with respect to any employee employed in a bona fide executive, administrative, professional \* \* \* capacity \* \* \* (as such terms are defined and delimited by regulations of the Administrator)."

Petitioner contended in the District Court and again in the Circuit Court of Appeals that even though the Act itself be held applicable to its newspaper publishing business

all of its employees engaged in gathering, writing and editing the news are exempt from the minimum wage and overtime provisions of the law under Section 13 (a) (1) as being employed in a bona fide professional capacity and its working foremen, and more specifically its composing room foreman, exempt from the overtime provisions of the law by reason of Section 13 (a) (1) of the Act as being employed in a bona fide executive capacity.

Petitioner attacked the definitions of "employed in a bona fide executive \* \* \* professional capacity" as promulgated by the Administrator and applied to its newspaper publishing business as arbitrary, capricious and unreasonable and contrary to the custom of the business.

The Administrator disregarded the customs and practices of newspaper publishers and of the newspaper mechanical trade unions for more than 50 years when in his definition of an executive he placed a limitation on the executive's work in such a way as to remove a newspaper foreman from the classification of an executive if he works more than eight hours per week at the same kind of work as is performed by a journeyman under his direction. The record shows that by that limitation the Administrator attempted to remove working foremen on more than 1,000 daily newspapers in the United States from their status as bona fide executives, recognized for more than 50 years in the business by employer and employee groups alike. Working foremen have the exclusive right to hire, fire and assign the journeymen and apprentices working under them to their daily tasks. Not even the President of petitioner company could hire or fire or assign an employee to work in its composing room (R. 482).

It is significant that in his definitions of "employees employed in a bona fide executive, administrative, professional \* \* \* capacity" the Administrator placed a salary limitation of \$30 per week upon executive employees

and \$200 per month upon administrative and professional employees.

It is respectfully submitted to this Court that the amount of financial consideration received by an employee does not in any sense of the word determine his status.

Courts have refused to accept the salary requirement as a valid element in the definition of an "executive" and have held that the Administrator exceeded the powers conferred upon him by so defining executive employees. *Devoe v. Atlanta Paper Co.*, 40 F. Supp. 284 (N. D. Georgia, July 31, 1941); *Buckner v. Armour & Co.*, 5 Wage and Hour Reporter 624 (N. D. Texas, July 22, 1942).

It is equally true that a salary requirement has no place in the definition of a "professional".

In respect of the regulation promulgated by the Administrator defining a professional employee, the record shows that the object of this particular regulation was to extend the "benefits" of the Act as widely as possible (R. 496). To that end a minimum salary qualification of \$200 per month was ordered for all professionals other than lawyers or doctors holding licenses to practice and actually engaged in the practice of their professions. Thus the Administrator sought to determine professional status for certain professional employees not solely on what they do but what they do plus what they get for doing it.

While the record showed almost universal acceptance of the fact, prior to the enactment of the Act in controversy, that employment in the field of gathering, writing and editing the news is professional in nature, the Circuit Court of Appeals in upholding this regulation observed that it knew of no state that requires of newspaper reporters "an examination for competency, or license to practice; and there are editors of long experience and trained judgment who

\* \* \* believe that the only practical school of journalism is the newspaper office.”<sup>2</sup>

It is respectfully submitted that the very thought of licensed reporters and editors as discussed by the Circuit Court of Appeals is repugnant to the guaranty of the First Amendment and that this Court should review the record to determine whether the definition of a bona fide professional employee, as applied to the newspaper publishing business, is not arbitrary and capricious and that the same should be done with respect to respondent's definition of an executive, as applied to the newspaper business in a manner contrary to custom, practice and authority exercised by executives for more than 50 years.

#### POINT 6.

*The holding by the Circuit Court of Appeals that petitioner is responsible for the failure of its employees to carry out its instructions in respect of hours to be worked and reports to be made thereon is in conflict with the decisions of numerous other courts, has not heretofore been presented to this Court, and should be determined by this Court.*

It is not disputed in the record that, following the first inspection by an agent of the respondent, the general manager of petitioner issued instructions to all employees, other than executives, to perform their work within the maximum number of hours specified under the Act here in

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<sup>2</sup> The record shows there are 32 Class A schools of journalism in the United States today; that there are more than 700 other colleges giving regular courses in journalism and that the requirements for admission to the graduate schools (Class A) are similar to the requirements of graduate schools of medicine and law (R. 481). It will be recalled that only a few years ago many lawyers preferred lawyers trained in law offices to law schools, just as the Circuit Court of Appeals says some newspaper editors now prefer newspaper office trained journalists to graduates of schools of journalism. That question of preference in the method of training does not affect the status of one engaged in a profession, however.

controversy and to turn in time slips on each payday showing the number of hours worked each day during the preceding work week. With one exception, every employee who testified for the government in respect of these instructions and as to the nature of the time slips turned in testified that he either disregarded the instructions in toto or turned in time slips that were inaccurate, or both. The exception was P. D. Kersh, working foreman in the composing room, who kept no record of his own time because he considered himself an executive but who did keep a record of the time put in by the employees under his supervision for whom he turned in time slips each week as required by the contract with his union. The time slips for his subordinates were accurate as to hours worked except on Saturday nights where under the union contract  $6\frac{1}{2}$  hours constituted a day's work and anything over  $6\frac{1}{2}$  hours was calculated as overtime beyond 8 hours.

It has been held that an employee is not entitled to recover statutory overtime compensation in an action wherein he claimed to have worked overtime when the evidence showed that the company instructed him to work the statutory hours and that the additional time he spent on the job was of his own volition and without knowledge of the company. *Anderson v. Sun Bright Lumber Co.*, 6 Wage and Hour Reporter 697 (Tennessee Court of Appeals, May 26, 1943).

It has been held that an employer has the right under the Fair Labor Standards Act to establish a rule or policy prohibiting overtime work by employees. *Jackson v. Derby Oil Co.*, 6 Wage and Hour Reporter 747 (Kansas Supreme Court, January 12, 1943).

In two recent New York cases the court held that the burden was upon the plaintiff to establish not alone the fact of overtime work but the quantity of overtime work

each week and that the complaining employees who kept no record of the hours they claimed to have worked and accepted their wages without protest were without remedy under the Act. *Ralston v. Karp Metal Products Co.*, 5 Wage and Hour Reporter 937 (New York Supreme Court, Kings County, November 17, 1942); *Rosen v. Weissman*, 5 Wage and Hour Reporter 938 (New York City Court, Kings County, November 17, 1942).

It is significant in this case that the employees were instructed to keep records of their time and to file time slips with their employer recording their time before they could receive their pay. It is even more significant that none of them kept any other records and that those who were called to the witness stand, again with the single exception of Kersh who testified that he could not compute his time because he had kept no record of it, attempted to reconstruct their time out of their heads.

The sole question as to violation of the provisions of Section 6 is presented in respect of part-time employees in the mail room of petitioner's newspaper. If, as contended by petitioner, it is not engaged in commerce or in producing goods for commerce and that the *de minimis* doctrine applies, these employees are not covered by the Act.

This Court, however, has never passed upon the question raised in the foregoing cases as to the responsibility of an employer for the deliberate failure of his employees to carry out his instructions in respect of overtime. Neither has it determined the application of the *de minimis* doctrine to the newspaper publishing business in respect of the infinitesimal amount of out of state circulation involved. The questions thus raised are now presented to this Court for the first time and it is respectfully submitted they should be decided.

IV.

**Conclusion.**

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 18, 1944.





## APPENDIX.

### Constitutional Provisions Involved.

The constitutional provisions involved are Article I, Section 8, Clause 3, of the Constitution of the United States and the First and Fifth Amendments to the Constitution of the United States.

Article I, Section 8, Clause 3, of the Constitution of the United States provides that:

“The Congress shall have Power \* \* \* To regulate Commerce \* \* \* among the several States \* \* \*.”

The First Amendment to the Constitution of the United States provides that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Fifth Amendment to the Constitution of the United States provides that:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”



[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

#### ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

#### INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.<sup>1</sup>

#### MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

- (1) during the first year from the effective date of this section, not less than 25 cents an hour,
- (2) during the next six years from such date, not less than 30 cents an hour,

<sup>1</sup> Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.<sup>1</sup>

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).<sup>1</sup>

#### MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

<sup>1</sup> Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

#### WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

#### ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

#### COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

#### INVESTIGATIONS, INSPECTIONS, AND RECORDS

Sec. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

#### CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

#### EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

[Pub. 719.]

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.<sup>1</sup>

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

#### LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

#### PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

<sup>1</sup> Amendment provided by Act of August 9, 1939 (Public No. 844, 76th Congress. 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

#### PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

## INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

## RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

## SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.



Title 29, Chapter V  
Code of Federal Regulations  
Part 541

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**Regulations**

**Defining and Delimiting the Terms**

**“Any Employee Employed in a Bona Fide  
Executive, Administrative, Professional,  
or Local Retailing Capacity, or in the  
Capacity of Outside Salesman”**

Pursuant to Section 13 (a) (1)  
of the Fair Labor Standards Act of 1938  
(52 Stat. 1060)

DECEMBER 1940



UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION

First issued October 1938. Amended Regulations  
Approved by the Administrator October 12, 1940, and  
published in the Federal Register October 15, 1940  
(5 F.R. 4077).

## Regulations

### Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman"

#### Pursuant to Section 13 (a) (1) of the Fair Labor Standards Act of 1938

##### Section 541.1.—Executive.

The term "employee employed in a bona fide executive \* \* \* capacity" in section 13 (a) (1) of the act shall mean any employee—

- (A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and
- (B) who customarily and regularly directs the work of other employees therein, and
- (C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and
- (D) who customarily and regularly exercises discretionary powers, and
- (E) who is compensated for his services on a salary basis at not less than \$30 per week (exclusive of board, lodging, or other facilities), and
- (F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

##### Section 541.2.—Administrative.

The term "employee employed in a bona fide \* \* \* administrative \* \* \* capacity" in section 13 (a) (1) of the act shall mean any employee—

- (A) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and
- (B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

- (2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or
- (3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.

**Section 541.3.—Professional.**

The term “employee employed in a bona fide \* \* \* professional \* \* \* capacity” in section 13 (a) (1) of the act shall mean any employee who is—

(A) engaged in work—

- (1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and
- (2) requiring the consistent exercise of discretion and judgment in its performance, and
- (3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and
- (4) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the hours worked in the workweek by the nonexempt employees; provided that where such nonprofessional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as nonexempt work; and
- (5) (a) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or
- (b) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee, and

- (B) compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities); provided that this subsection (B) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or

medicine or any of their branches and who is actually engaged in the practice thereof.

**Section 541.4.—Local retailing capacity.**

The term "employee employed in a bona fide \* \* \* local retailing capacity" in section 13 (a) (1) of the act shall mean any employee—

- (A) who customarily and regularly is engaged in
  - (1) making retail sales the greater part of which are in intrastate commerce; or
  - (2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and
- (B) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by such nonexempt employees.

**Section 541.5.—Outside salesman.**

The term "employee employed \* \* \* in the capacity of outside salesman" in section 13 (a) (1) of the act shall mean any employee—

- (A) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in
  - (1) making sales within the meaning of section 3 (k) of the act; or
  - (2) obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer, and
- (B) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by such nonexempt employees; provided that work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

**Section 541.6.—Petition for amendment of regulations.**

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes. In determining such future regulations, separate treatment for different industries and for different classes of employees may be given consideration.



For Release Saturday,  
January 17, 1942

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R-1722

U. S. DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
Washington

PART 541 - REGULATIONS DEFINING AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, OR LOCAL RETAILING CAPACITY, OR IN THE CAPACITY OF OUTSIDE SALESMAN" PURSUANT TO SECTION 13(a)(1) OF THE FAIR LABOR STANDARDS ACT

The following amendment to Regulations, Part 541 (Regulations Defining and Limiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman" pursuant to Section 13(a)(1) of the Fair Labor Standards Act) is hereby issued. This amendment amends section 541.2, defining the term "employee employed in a bona fide administrative . . . capacity," as used in section 13(a)(1) of the Fair Labor Standards Act. Said amendment shall become effective upon my signing the original upon the publication thereof in the Federal Register, and shall be in force effect until repealed by regulations hereafter made and published.

SECTION 541.2--Administrative

The term "employee employed in a bona fide . . . administrative . . . capacity" in section 13(a)(1) of the act shall mean any employee--

- (A) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and
- (B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or
- (2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or
- (3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or
- (4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

Signed at Washington, D. C. this 16th day of January, 1942.

Published in Federal Register,  
January 17, 1942

*Thomas W. Holland*  
Thomas W. Holland, Administrator  
Wage and Hour Division  
U. S. Department of Labor

(9322)



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U. S. Supreme Court, U. S.  
FILED  
APR 10 1943  
RECEIVED

No. 307

**In the Supreme Court of the United States**

**OCTOBER TERM, 1943**

**SUB PUBLISHING COMPANY PETITIONER**

**L. METCALFE WALLACE, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES DE-  
PARTMENT OF LABOR**

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT**

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 807

SUN PUBLISHING COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES DE-  
PARTMENT OF LABOR

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT*

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINION BELOW

The findings of fact and conclusions of law of the district court (R. 610-632) are reported in 47 F. Supp. 180-192. The opinion of the circuit court of appeals (R. 652-659) is reported in 140 F. (2d) 445.

## JURISDICTION

The judgment of the circuit court of appeals was entered on January 24, 1944 (R. 651). The petition for writ of certiorari was filed on March 18, 1944. Jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a decree enjoining a newspaper publisher, from making underpayments of wages in violation of Sections 6 and 7 of the Fair Labor Standards Act infringes the freedom of the press guaranteed by the First Amendment.

2. Whether Congress infringed the First and Fifth Amendments by excepting from the scope of the Act small newspapers with weekly or semi-weekly local circulation.

3. Whether Congress has the power, under the commerce clause, to apply the Act to petitioner's newspaper publishing business, and whether the Act does apply to that business.

4. Whether petitioner is exempt from the application of the Act as a "service establishment the greater part of whose \* \* \* servicing is in intrastate commerce" (Section 13 (a) (2)).

5. Whether the Administrator's regulations defining "employee employed in a bona fide executive, \* \* \* professional \* \* \* capacity" (Section 13 (a) (1)) as applied to petitioner's employees are arbitrary, capricious, and unreasonable, and therefore void.

6. Whether the record supports the affirmance, by the circuit court of appeals, of the district court's decree enjoining violations of the record-keeping provisions of the Act (Sections 15 (a) (5) and 11 (c)).

**CONSTITUTIONAL, STATUTORY, AND REGULATORY  
PROVISIONS INVOLVED**

Article 1, section 8, clause 3, and the First and Fifth Amendments of the Constitution are set forth on page 33 of the Appendix to petitioner's brief; the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201 et seq.) is set forth on pages 35-47 of the Appendix to petitioner's brief; the regulations of the Administrator promulgated under the authority of Section 13 (a) (1) of the Act and defining "bona fide executive, \* \* \* professional \* \* \* capacity" are set forth on pages 49-55 of the Appendix to petitioner's brief.

**STATEMENT**

Petitioner is engaged at Jackson, Tennessee, in operating a radio station and publishing a daily and Sunday newspaper named "The Jackson Sun." The newspaper's daily paid circulation was 8,461 copies in 1938, 8,789 copies in 1939, and 9,127 copies in 1940 and 1941. Its paid Sunday circulation was about 11,000 copies. During these years it published and shipped daily (excluding Saturday) to points outside the State of Tennessee about 200 paid copies. During the period in which violations of the Fair Labor Standards Act were alleged, approximately 150,000 paid copies of "The Jackson Sun" were shipped outside of the State. This computation does not include complimentary copies sent outside of the State. (R. 372, 373, 450.)

The newspaper is a member of the Associated Press and is linked to its nation-wide news-gathering and transmitting network by means of a teletype which that association maintains in its office. Through this medium it receives reports, stories, market quotations and financial news, the greater part of which originates in States other than the State of Tennessee. (R. 352, 353, 354, 453.) This material is incorporated into the newspaper immediately after its receipt in accordance with usual publishing procedures (R. 244, 357, 358, 453, 454). In conformity with the requirements of the by-laws of the Associated Press (Art. 8, Sec. 3,) the newspaper furnishes that Association with local news; a few hundred words are transmitted each week (R. 355, 356, 453). Petitioner regularly receives over the wires of the Southern Bell Telephone and Telegraph Co. news gathered by the world-wide facilities of the United Press. This service is maintained primarily for its radio activities, but the newspaper has the right to, and occasionally does, use United Press copy. (R. 358, 359, 454.) The original of the transcribed material goes to the radio station and a "drop copy" is sent to the newspaper (R. 358).

The newspaper also receives from out of the State, for incorporation into its daily or Sunday

editions, miscellaneous special features and articles.<sup>1</sup>

The newspaper carries the national advertising of out-of-State producers or distributors solicited for it by The Branham Company of Chicago, Illinois (R. 365, 456) amounting to approximately \$12,000 per year (R. 364-365), which is about 10 percent of its total advertising revenue (R. 456).<sup>2</sup>

<sup>1</sup> Each week petitioner receives from Peoria, Illinois, a four-page comic supplement which is "stuffed" into the Sunday newspaper and distributed to subscribers both within and without the State (R. 363, 456). The N. E. A. Service, Inc., of Cleveland, Ohio, furnishes, for incorporation into the daily newspapers, "Medicine in the News," by Morris Fishbein; "With Edson in Washington," by Peter Edson; crossword puzzles, serial stories, comic strips, etc. The King Features Syndicate of New York City transmits, for the same purpose, "News Behind the News," by Paul Mallon; "Human Side of the News," by Edwin C. Hill; "Behind the Scenes in Hollywood"; "Broadway Medley"; "Contract Bridge," by Eli Culbertson; "Arthur 'Bugs' Baer," and comics. (R. 359, 363, 455.) Pictures and other features are furnished by World Wide News Service in New York and the Central Press Association in Ohio (R. 360, 455). It also receives full prepared items and articles for the radio page on programs for the coming week supplied by the Mutual Broadcasting System, from either New York or Chicago (R. 362).

<sup>2</sup> Orders and instructions for advertising, mats or electrotype plates, are transmitted directly to the newspaper from practically every State in the Union (R. 368, 456). "Tear sheets" are sent by the newspaper to advertising agencies outside the State, as proof of publication of the advertisements (R. 368). The newspaper is also a regular subscriber to the service of the Meyer-Both Company of New York, which furnishes, from out-of-State sources, mats for printing pictures to illustrate advertisements and catalogues from which local merchants make selections for their advertising (R. 383, 457).

The advertising activities of the newspaper necessitate a good deal of interstate correspondence, communication and shipment of materials (R. 369, 456).

Substantially all of the materials used by petitioner in printing its paper (newsprint, inks, linotype metal, stereotype metal, and mats) are shipped to petitioner's plant from outside the State (R. 457-458). The cores of the newsprint rolls, empty drums of ink and the dross of linotype and stereotype metal are returned by the newspaper to the out-of-State manufacturers (R. 458).

Additional interstate activities arise out of the relationship between appellant's radio station and its newspaper. Although the staffs of the radio station and newspaper are stated to be separate (R. 222), some employees perform services for both departments (R. 501) and news is exchanged between them. The United Press equipment is located in the radio station (R. 359), and the incoming information is there received and passed on to the newspaper (R. 358). The Associated Press equipment, on the other hand, is located in the newspaper offices (R. 244, 453). The local news that is broadcast over the radio station "comes out of the Jackson Sun" (R. 213). Announcers receive copies of the paper on which newspaper employees have indicated the news of interest (R. 213). In some cases the news re-

porter's original transcript is provided and on occasions the newspaper reporters telephone in rush news such as election returns (R. 213). It was stated that whole paragraphs are occasionally read from the paper and that the newspaper is the source of this local news (R. 94, 373-374).<sup>3</sup>

The employees involved in this suit perform the various tasks incident to the activities described. They include the writers and reporters who receive and prepare headlines for the news coming over the Associated Press wire (R. 243, 244), and who gather and compose the news stories (R. 386, 243, 245) and make up news sections such as the sports page and the theatre page (R. 243, 386); the linotypers and stereotypers (R. 185, 426, 553) and the workers who cast the cuts and mold the metal plates and operate the press (R. 309, 426); employees performing the subscription and circulation functions (R. 437-438); the mail-room employees who set

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<sup>3</sup> Petitioner states "The radio operations of petitioner are not involved in this proceeding" (p. 2). The Administrator's complaint alleged violations of the Act with respect to its radio employees (R. 2, 3, 4, 6); the district court found that violations had occurred with respect to such employees (R. 611-614); the district court judgment does not exclude such employees (R. 632-634); and, indeed, petitioner admitted the interstate character of the activities of its radio employees (R. 60-61, 611). Petitioner's quoted statement, therefore, must be taken to mean that it concedes the propriety of the injunctive relief granted by the district court with respect to its radio employees.

up galleys, address, wrap, and mail the out-of-town papers, including the papers to out-of-State subscribers (R. 236, 415), and who "stuff" into the Sunday papers the printed sections received from extrastate sources (R. 238); employees who handle the correspondence and keep records relating to national advertising (R. 185-186, 366-369); and the cashier and bookkeeper who maintain records and accounts both for the newspaper and the radio departments (R. 500-501).

The district court found that there were repeated violations of the minimum wage provisions of the Act as to certain named employees in both the radio and the newspaper departments (R. 612); that there were repeated violations of the overtime provisions in both departments (R. 612-613); and that the pay-roll records were inadequate and inaccurate (R. 613).

The district court, accordingly, decreed that petitioner be restrained from violating the provisions of Sections 15 (a) (2) (prohibiting minimum wage and overtime underpayments), 15 (a) (5) (prohibiting record-keeping violations), and 15 (a) (1) (prohibiting shipment in interstate commerce of newspapers in the production of which any employee of the petitioner was employed at rates below those prescribed by the Act) (R. 632-634).

The circuit court of appeals affirmed the judgment except that it ordered that paragraph 3 of

the district court decree be amended by adding the following proviso: "Provided that nothing herein shall prevent or prohibit the defendant [petitioner] from shipping, delivering, transporting, or offering for transportation or sale its newspapers in interstate commerce or otherwise" (R. 651, 659).<sup>4</sup>

#### ARGUMENT

1. Petitioner's contention that the First Amendment precludes application of the Fair Labor Standards Act to newspapers is foreclosed by *Associated Press v. National Labor Relations Board*, 301 U. S. 103,<sup>5</sup> which holds that a general non-

<sup>4</sup> We believe that the circuit court of appeals erred in amending the decree entered by the district court so as to eliminate that part of the injunction which restrains shipment of petitioner's papers across State lines. We do not, however, ask this Court to review that portion of the judgment because it has no practical significance in the instant case. The public interest is adequately protected by the provisions of the decree which enjoin petitioner from violating Sections 6, 7, and 11 of the Act. If those portions of the decree are complied with, there will be no "hot goods," the shipment of which would be unlawful under Section 15 (a) (1).

We point this out because in other cases an injunction restraining the shipment of "hot goods" might be important. For example, the only conduct expressly declared unlawful in Section 12, dealing with child labor, is the shipment of goods produced in an establishment in or about which oppressive child labor has been employed; there is no express prohibition against the *employment* of oppressive child labor in the production of goods for commerce.

<sup>5</sup> See also *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4); *Patterson v. Colorado*, 205 U. S. 454; *Ex parte Jackson*, 96 U. S. 727; *Lewis Publishing*

discriminatory, regulatory law may be applied to the press. There is obviously no difference in this respect between the National Labor Relations Act and the Fair Labor Standards Act.

This principle is not rendered inapplicable because of the provision in Section 13 for the exemption of certain industries and certain types of employees. A statute of general application does not lose its character as a general law because of exemptions which in no way affect the press. As long as the Act does not discriminate against the press, it is immaterial whether or not it covers business universally.

2. Petitioner argues that the application of the Act to it violates the First and Fifth Amendments because of the clause exempting "any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed or published" (Section 13 (a) (8)). In this connection petitioner states that its newspaper competes with

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*Co. v. Morgan*, 229 U. S. 288; *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268; *Press Co. v. National Labor Relations Board*, 118 F. (2d) 937 (App. D. C.); *United States v. Associated Press*, 52 F. Supp. 362 (S. D. N. Y.; appeals to this Court taken); *Fleming v. Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. (2d) 213 (C. C. A. 1), affirmed *per curiam*, 315 U. S. 784.

fourteen such weekly papers published in the vicinity of Jackson (Pet., p. 19).<sup>6</sup>

Section 13 (a) (8) was intended to apply to the "little country publisher", an "infinitesimal bit" of whose business goes outside of the state, "when on each side of this little printshop are the butcher and the baker, who are exempt and who are financially better fixed than he is" (83 Cong. Rec. 7445). Such a classification cannot be regarded as arbitrary or unreasonable in violation of the Fifth Amendment.<sup>7</sup> *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, 510; *Steward Machine Co. v. Davis*, 301 U. S. 548, 584; *Tigner v. Texas*, 310 U. S. 141; *Currin v. Wallace*, 306 U. S. 1, 13-14; *Florida Fruit and Produce Inc. v. United States*, 117 F. (2d) 506 (C. C. A. 5).

Nor does such a classification violate the First Amendment. Neither its purpose nor its effect is to interfere with freedom of the press. The case thus clearly differs from *Grosjean v. American Press Co.*, 297 U. S. 233, which petitioner claims to be in conflict. The license tax on soliciting advertising imposed on newspapers with a circula-

<sup>6</sup> The record shows that these weeklies were published in towns from seventeen to forty-five miles from Jackson (R. 451), but is otherwise silent as to the extent of the competition, if any, between them and petitioner. It does not appear that any of these weeklies have an interstate circulation.

<sup>7</sup> The Fifth Amendment contains no equal protection clause. *Steward Machine Co. v. Davis*, 301 U. S. 548, 584; *LaBelle Iron Works v. United States*, 256 U. S. 377, 392; *Helvering v. Lerner Stores Co.*, 314 U. S. 463, 468.

tion of over twenty thousand was regarded in the *Grosjean* case as a "calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties" (p. 250). None of the factors which led the Court to that conclusion is present here. A general regulatory statute may contain reasonable classifications applicable to newspapers as long as there is no abridgment of the freedom of the press.

3. Petitioner claims that the decision below is in conflict with *Schroeffer v. A. S. Abell Co.*, 138 F. (2d) 111 (C. C. A. 4), certiorari denied January 27, 1944; that petitioner's employees were not engaged in commerce or the production of goods for commerce within the meaning of the Act; and that if they were, the commerce involved was so small as to bring the case within the *de minimis* doctrine.

There is no basis for the claim that the decision of the court below is in conflict with that of the circuit court of appeals in the *Schroeffer* case. It was there held that local distributors of a newspaper, after it is printed, are not engaged in commerce or the production of goods for commerce. The Fourth Circuit Court of Appeals pointedly distinguished that case from such a state of facts as is here presented by observing "They [the local distributors] had nothing to do with collecting news, assembling it, printing the

paper, or any other activity in which interstate commerce was involved" (p. 112). In this case the petitioner and its employees were engaged in just such activities as were conceded to be within the scope of the commerce power and the Act in the *Schroepfer* case, and were specifically held to be within the scope of that power and the provisions of the National Labor Relations Act by the same court in *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4).

As the district court found (R. 630), those of petitioner's employees engaged in the receiving and handling of news, information, and intelligence from out-of-state sources were in interstate commerce, and those employees engaged in the preparation, printing, and handling of newspapers for regular daily shipment outside the state were engaged in the production of goods for commerce. This conclusion is challenged by petitioner mainly on the ground that less than three percent of the circulation goes to subscribers outside the state. This contention does not, of course, affect those of petitioner's employees who are engaged in interstate commerce. Moreover, this small interstate percentage amounts to two hundred copies per day and approximately sixty-three thousand per year (R. 450), which is hardly *de minimis*. The fact that the proportion of goods produced for

commerce is small is immaterial, as has frequently been held.<sup>8</sup> This interpretation of the Act is supported by a direct statement in the legislative debate,<sup>9</sup> as well as by the recognized need for an exemption if small rural papers with a minute interstate circulation were to be excepted.

4. Exemption is claimed on the theory that inasmuch as a newspaper performs an important public service, it is a "service establishment" to the activities of which the Act is made inapplicable by Section 13 (a) (2). It is

<sup>8</sup> Cf. *United States v. Darby*, 312 U. S. 100, 123. This question was treated and the cases cited in the brief for the Administrator in *Walling v. James V. Reuter, Inc.*, No. 436, this Term, page 30. In those cases, as in the present case, the significant fact which made inapplicable the *de minimis* doctrine was that "while the volume is small as compared with its whole business it is substantial, and it was not casual or incidental but a part of its regular business." *Muldowney v. Seaberg Elevator Co.*, 39 F. Supp. 275, 281 (E. D. N. Y.). Cf. *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4), in which 1.7 percent of the daily evening edition of a newspaper and 7.4 percent of the Sunday edition were shipped to destinations outside the State. In holding the publishing company to be subject to the National Labor Relations Act the court said, "It is true the circulation which goes outside the State of Maryland is a relatively small part of the whole, but it nevertheless constitutes in itself a substantial volume of business" (p. 954).

<sup>9</sup> In the debates on the Act, Senator Borah, who was explaining its coverage and expounding its constitutional aspects, assured Senator Glass, in response to his inquiry, that the Act applied to a Virginia newspaper with 20,000 subscribers, all of whom, except for 10 out-of-State subscribers, resided in Virginia (83 Cong. Rec. 9172).

well established, however, that the exemption was intended to apply only to the typical service trades such as barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops, hotels, restaurants, garages, and repair shops. It does not apply to processing plants merely because the product "serves the public." *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, at 571-572 (C. C. A. 3), affirmed, 316 U. S. 517. Cf. *Lonas v. National Linen Service Corp.*, 136 F. (2d) 433 (C. C. A. 6); *Walling v. Peoples Packing Co.*, 132 F. (2d) 236 (C. C. A. 10); *Guess v. Montague*, 140 F. (2d) 500 (C. C. A. 4); *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40, 47 (W. D. Tenn.). The term "service" was not intended to be used in its broadest sense, as contended by the petitioner, to exempt public utilities, railroads, gas and electric companies, telephone and telegraph companies, newspapers and the multitude of businesses which perform "services" for the public. *Schmidt v. Peoples Telephone Union of Maryville*, 138 F. (2d) 13 (C. C. A. 8).

Furthermore, petitioner's contention that all newspapers are exempt as "service establishments" renders meaningless the exemption of weekly and semiweekly newspapers with less than 3000 circulation the major part of which is county-wide (Section 13 (a) (8)). Manifestly, the explicit exemption of this class of newspaper

imports a purpose to cover those not conforming to the terms of the exemption.

5. Petitioner contends that its employees engaged in gathering, writing and editing the news are exempt from the application of the Act because they are employed in a bona fide professional capacity, and that its working foremen are exempt because they are employed in a bona fide executive capacity under Section 13 (a) (1). The Administrator's definitions of "bona fide executive \* \* \* [or] professional \* \* \* capacity"<sup>10</sup> are attacked as "arbitrary, capricious and unreasonable and contrary to the custom of the business" (Pet., p. 27).

Section 13 (a) (1) authorizes the Administrator to define employees "in a bona fide executive, administrative, [or] professional capacity." Briefly, the regulations<sup>11</sup> define an "employee

<sup>10</sup> 29 CFR, 1940 Supp. 541.1, 541.3, printed in the Appendix to petitioner's brief, pp. 49-55.

<sup>11</sup> The regulations were issued on October 24, 1940 after considerable experience with previous regulations covering the subject. The Administrator had the advantage of a "Report and Recommendations" of a Hearing Officer (R. 469; Plaintiff's Exhibit No. 24; see U. S. Dept. of Labor, Wage and Hour Div., *"Executive, Administrative, Professional \* \* \* Outside Salesman" Redefined* (U. S. Govt. Printing Office (1940)), which sets forth the considerations which were weighed in making the recommendations contained therein. Hearings were held during 14 days in 1940 after notice had been given to interested persons and groups. Among the appearances noted were 127 representatives of employers and employers' associations and 34 representatives of employee

employed in a bona fide executive \* \* \* capacity," to whom the minimum wage and overtime provisions of the Act do not apply, as an employee (1) whose primary duty consists of management of the establishment or of a recognized department thereof, (2) who customarily and regularly directs the work of other employees, (3) who has authority to hire and fire other employee or whose recommendations in such matters are given particular weight, (4) who customarily and regularly exercises discretionary powers and (5) who performs not more than 20 percent work of the same nature as that performed by non-exempt employees. "Employee employed in a bona fide \* \* \* professional \* \* \* capacity" is defined as an employee (1) whose work is predominantly intellectual and varied in character, not routine mental, manual or mechanical (2) whose work requires the consistent exercise of discretion and judgment, (3) whose output cannot be standardized in relation to a given period of time, (4) who does not perform more than 20 percent work of the character performed by non-exempt employees, unless such work is essential or incidental to work of a professional

groups. A full opportunity to testify and cross-examine witnesses was afforded and many briefs and memoranda filed. The attorney for petitioners was present at the hearings and was given an opportunity to express his views (R. 470, 471, 473).

character, (5) whose work requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, or whose work is predominantly original and creative in character in a recognized field of artistic endeavor, and (6) who is compensated at a salary of not less than \$200 per month.<sup>12</sup>

Every circuit court of appeals confronted with the question of whether the Administrator's regulations are valid has upheld them. *Walling v. Yeakley*, 7 Wage Hour Rept. 61 (C. C. A. 10, 1944); *Fanelli v. United States Gypsum Co.*, 7 Wage Hour Rept. 214 (C. C. A. 2, 1944); *Knight v. Mantel*, 135 F. (2d) 514 (C. C. A. 8); *Joseph v. Ray* 139 F. (2d) 409 (C. C. A. 10); *Helliwell v. Haberman*, 7 Wage Hour Rept. 282 (C. C. A. 2, 1944); *George Lawley & Son Corp. v. South*, 140 F. (2d) 439 (C. C. A. 1, 1944). The legislative delegation of power to the Administrator was valid (*Yakus v. United States*, No. 374, this Term, 1943, decided March 27, 1944), the regulations are reasonable and have a basis in fact, and are therefore, "as binding on the courts as if they had been directly enacted by Congress." *Fanelli v. United States Gypsum Co.*, *supra*, at p. 215. Cf.

<sup>12</sup> Doctors and lawyers validly licensed to practice and actually engaged in practice are excepted from the salary requirement.

*Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218; *United States v. Bush & Co.*, 310 U. S. 371, 380; *Gray v. Powell*, 314 U. S. 402. Nor was it unreasonable to apply the regulations so as to hold that a reporter was not a "professional" employee, or that a foreman who spent about eighty percent of his time performing mechanical work (R. 619), as distinct from supervisory functions, was not an executive.

6. The petition for certiorari asserts that the violations of the record-keeping regulations were due to the fact that petitioner's employees disregarded its explicit instructions, and that petitioner cannot be held responsible for such violations (Pet. p. 10). This argument ignores the finding of the District Court, fully supported by the evidence, that petitioner "instructed employees to turn in a specified number of hours each week" (R. 613, 155, 177-178, 216, 217, 234, 247, 311, 328, 387-389, 428-429, 441); that this "was frequently less than the number of hours they actually worked, and less than the time required to perform their assigned duties" (R. 613, 160, 177-178, 217, 218, 220, 232, 248, 264-266, 312, 326-328, 392, 441); that when an employee's time slip showed hours worked in excess of the number specified by the company "the fact \* \* \* was called to the employee's attention by the defendant's cashier, and same was changed to show the lesser number of hours specified" (R. 614, 615,

155, 233, 307); and that it repeatedly erased and changed its payroll records (R. 613, 77, 81, 82-91). Although the court also found that "the proof fails to disclose the defendant knowingly made false records" (R. 613), proof of wilfulness is not indispensable to the granting of an injunction, as distinct from a criminal conviction. Compare Sections 16 (a) and 17.

#### CONCLUSION

There is no conflict of decisions and the decision below is clearly correct. The petition for the issuance of the writ of certiorari, therefore, should be denied.

Respectfully submitted.

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